

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLANT**





76-1562

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----X  
UNITED STATES OF AMERICA

Appellee

Docket No. 76-1562

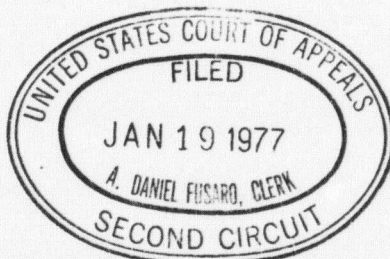
-against-

PRASARN BHONGSUPATANA

Appellant  
-----X

BRIEF ON BEHALF OF APPELLANT  
PURSUANT TO ANDERS V. CALIFORNIA

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PRELIMINARY STATEMENT UNDER  
SECOND CIRCUIT RULE 28

The judgment herein was rendered after a jury trial before United States District Judge Jack Weinstein in the United States District Court for the Eastern District of New York, which found the appellant guilty of Counts 1 and 2 of the indictment. Judgement of conviction was entered on November 12, 1976.

STATEMENT OF THE ISSUE

The sole issue in this case is whether there are any non-frivolous issues on appeal.

STATEMENT OF THE CASE

The appellant was indicted on a two count indictment. Count One charged the appellant with knowingly and intentionally importing into the United States approximately 6.1 kilograms of heroin hydrochloride in violation of Title 21, United States Code, Sections 952 (A) and 960 (a)(1), and Title 18, United States Code, Section. 2. Count Two charged the appellant with possession with intent to distribute a quantity of heroin hydrochloride in violation of Title 21, United States Code, Section 841 (a) (1).

THE GOVERNMENT'S CASE

United States Customs Inspector John Lava testified that on September 6, 1976 he inspected a shipment sent on board the vessel American Lancer at Holland Port in Staten Island. The shipment consisted of five packages contained



in a cargo container. He testified that he examined all the packages and one package in particular, a large concrete pedestal. He drilled into the pedestal and found that it contained heroin. A further search of the pedestal revealed two metal containers secreted in the center of the pedestal, both containing a total of 6.1 kilograms of heroin hydrochloride. The pedestal and the heroin were introduced into evidence, together with photos of the four other packages which contained Thai products, a xylophone, a spirit house, a canoe and a concrete base. The packages were in crates with the name Mah Chin marked on each.

Frederick Martorello, a forensic chemist employed by the Drug Enforcement Administration, testified that he analyzed the heroin taken from the pedestal and that it was heroin hydrochloride, 92% pure.

One Louis James DeMarco, a customs broker then testified that he was approached by the appellant on September 23, 1976 who identified himself as a Mr. Wumana and proffered three original bills of lading for the packages already seized by Customs. He stated that he wished Mr. DeMarco to clear these packages and arrange for their delivery to him at an address in Queens County, New York. The original consignee was indicated on the documents as one Mr. Mah Chin, 122 North 6th Street, in Brooklyn, New York. The defendant signed the necessary authorization for DeMarco as A. Wumana. The witness told him that the goods were personal goods and that the pedestal was to be placed in front of his sister's house. DeMarco then stated the appellant called him on September 24th, and requested speedy delivery. The appellant paid all of the



necessary charges. After September 27th, DeMarco conferred with agents of the Drug Enforcement Administration. The next conversation with the appellant regarding the shipment was taped by agents of the D.E.A. Arrangements were made for delivery on October 1st.

On October 1st, the witness received another call from the appellant complaining that the pedestal was broken and asking what he should do.

Special Agent John S. Taylor of the Drug Enforcement Administration was then called. He stated that in company with another agent he delivered the merchandise pursuant to appellant's instructions to 105-11 220th Street, in Queens. There he was met by appellant who accepted all of the packages but the pedestal containing heroin. The pedestal was then brought to 601 West 110th Street pursuant to appellant's instructions. When he arrived there with the truck and D.E.A. Agent Kibble, he observed the appellant in the neighborhood. The premises of 601 West 110th Street is an apartment hotel. He received a phone call from the appellant in the lobby who said he was in the Bronx after a car accident, telling Agent Taylor to leave the pedestal in front of the building and that he would pick it up later. Pursuant to the appellant's instructions, the agents placed the pedestal on the sidewalk in front of the building. He then took up a surveillance position and observed the appellant walking up and down in the vicinity of 601 West 110th Street. The witness then drove the truck back to 601 West 110th Street, where they received another phone call from appellant, saying he was still in the Bronx, and directing the agent to take the pedestal back to the warehouse. They then reloaded it on the truck and observed the appellant being placed under arrest.



Being qualified as an expert in the price of drugs, he stated that the value of the shipment in 1/8th kilogram purchases would be one million dollars.

Special Agent DeWitt S. Rabb of the Drug Enforcement Administration testified that he followed the appellant in Queens after Taylor left with the truck and pedestal. He stated he followed him on the subway, and detailed the efforts of the appellant to evade surveillance, frequently changing trains and doing everything to escape from the shadowing agent.

Special Agent John Coleman of the Drug Enforcement Administration testified that he was in charge of the investigation. He stated that he watched the appellant near premises 601 West 110th Street and observed him making telephone calls and watching the pedestal from various vantage points. He then placed him under arrest.

Certain documents to support appellant's visa application were admitted in evidence, one of which was from an organization called Electronic Aids. One Richard Stowe was called and testified that he had worked for Electronic Aids, which went out of existence in 1972, and no seminars for visiting foreign students were conducted in 1976.

#### THE DEFENSE CASE

The appellant, Prasarn Bhongsupatana, then testified in his own behalf. He said he was 42 years of age, married and resided in Bangkok in Thailand. He had worked as a salesman for several corporations in Bangkok and was now employed by a company owned by his wife's family dealing in machine farmbelts. He wanted to come to the United States in furtherance of the company's business and paid a Thai to get a visa for him. The Thai supplied the letters from



### Electronic Aids.

One Lehrock, a Thai known to him, gave him the bills of lading for the merchandise in this case and requested him to pick it up and that when he had received it, he would receive a call from one Mah Chin, a Chinese in New York, who would take the merchandise off his hands. He admitted negotiating with the customs broker. He said that he received the merchandise in Queens but found the pedestal broken and told the driver to take it back to the warehouse. The driver suggested that it be taken to 601 West 110th Street. He then went to 110th Street and had lunch at a Steak House in 111th Street. He denied getting on and off the subway to avoid the surveillance of Agent Rabb. He found the pedestal in front of 110th Street and called Customs Broker DeMarco and asked him to have it taken away.

He denied all knowledge of any heroin in the pedestal and stated he had never dealt in heroin in Thailand, nor did he have a criminal record in his country. The jury found the appellant guilty as charged on both counts of the indictment.

### POSSIBLE ISSUES ON APPEAL

The proof of the first count of the indictment raised no questions of law. The evidence submitted by the Government in its proof of Count One raised an issue of fact to be decided by the jury, which decided it against the appellant.

In his own testimony the appellant conceded that he agreed in Thailand to see that the merchandise shipment reached Mah Chin in New York City. (Trans. 22 to 24; 28; 48). He took all the necessary steps to obtain delivery of the packages, including the engaging of a customs broker, DeMarco and paying for



the duty and delivery charges. In addition he instructed the broker as to the place of delivery. Although he denied all knowledge of the fact that the pedestal in the merchandise contained heroin, (Trans. 49), this was a question of fact for the jury to consider in the light of all the evidence, including his behavior on October 1, 1976, the date of delivery, and there was sufficient evidence to support the jury's verdict of guilty on this count.

As to the second count there is a possible issue on appeal as to whether the appellant had possession of the heroin. The case went to the jury on this count on the question of constructive possession. The court properly charged the law as to constructive possession. (Trans. 144 & 145). Now the law in the Second Circuit is that where a defendant has dominion and control over the narcotics and can order it moved from place to place, even though he does not have actual physical possession of the substance, it is sufficient to establish constructive possession. In U.S. v. Pardo-Bolland, 348 F 2d. 316, cert. denied 86 S. Ct. 388, 382 U.S. 944, 15 L. Ed 2d. 353 (2d Cir. 1965) the defendant had baggage keys and claim checks, notwithstanding that narcotics agents had actual control of the narcotics from the time of the initial investigation in Canada until the search of the luggage in the parcel room of a New York railroad. This court held that he had constructive possession. In U.S. v. Rosario, 327 F 2d. 561 (2nd Cir. 1964) it was held that constructive possession may be established by showing of dominance and control over narcotics though physical custody remains in an agent over whom defendant exercises control.

In the instant case there is no question but that the agents of the Drug



Enforcement Administration had physical control of the heroin. However, the appellant could and did order it to be moved and delivered where he wished. In his first instructions to DeMarco, the customs broker, he ordered the package containing the heroin to be delivered to premises 105-11 220th Street, Queens Village, New York. (Trans. 44 & 45). Pursuant to his instructions this was done and it arrived there on October 1st, 1976 where the appellant was ready to receive it. When it arrived at the Queens Village address, the appellant then ordered the driver of the truck to take it to 601 West 110th Street, New York City. At 601 West 110th Street, the appellant then requested that it be brought back to the warehouse and as it was late Friday afternoon, he stated he would pick it up on Monday. In accordance with appellant's instructions the pedestal was reloaded on the truck. (Trans. 77)

Although actual possession was in the agents of the Drug Enforcement Administration, they were acting as common law agents for the appellant in moving the heroin as he directed. Physical control of heroin by an agent whose actions one can control is sufficient to constitute constructive possession of the heroin. (U.S. v. Figueroa, 337 F. Supp. 645, D.C. N.Y. 1972). There is no question that the jury properly found appellant to be in constructive possession of the heroin. He had the power to order the agents to move it as he wished, and they did so in accordance with his orders. It was first brought to 105-11 220th Street, Queens Village, at his instructions, and then to 601 West 110th Street, New York City, also at his instructions. The fact that D.E.A. agents had actual possession of the heroin did not impair appellant's constructive posses-



sion. (U.S. v. Gitlitz, 368 F 2d 501, 2nd Cir. cert. denied 87 S. Ct. 1492, 386 U.S. 1038, 18 L.Ed. 2d 602).

There are no other questions of law which could be properly raised on appeal. The other issues were questions of fact which were resolved against the defendant by the jury. There are no non-frivolous issues on which to appeal.

#### CONCLUSION

For the above stated reasons there are no non-frivolous issues which can be raised on appeal. Accordingly, it is respectfully requested that John C. Corbett be relieved as counsel on this appeal.

Respectfully submitted,

JOHN C. CORBETT  
Attorney for appellant.

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U. S. ATTORNEY

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